Supreme Court, U. S.
FILED
JUN 28 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1739

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL EDUCATION ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STEPHEN J. POLLAK
JOHN TOWNSEND RICH
SHEA & GARDNER
734 Fifteenth St., N.W.
Washington, D.C. 20005

Of Counsel:

SHEA & GARDNER
734 Fifteenth St., N.W.
Washington, D.C. 20005

RICHARD L. HORN
MILLEDGE, HORN & HERMELEE
2699 South Bayshore Dr.
Miami, Florida 33133

Attorneys for Respondent

June 28, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
Table of citations	II
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	2
Statement of the case	3
A. Introduction	3
B. Statement of facts	4
C. The narrowing of issues before trial	7
D. The reasonableness of the NEA rule	9
E. The remaining proceedings below	11
Argument	12
1. Petitioner's first two questions are inappropriate grounds for a writ of certiorari	12
2. Petitioner is attempting to present a freedom of speech question that was neither litigated nor ruled upon below	12
3. Petitioner's "chilling effect" argument has no support in the record or findings below and is without merit	13
4. The decision below that NEA was enforcing a reasonable organizational rule within the proviso to Section 101(a)(2) of the LMRDA was correct and presents no substantial question for review	15
Conclusion	18

TABLE OF CITATIONS

Cases:	Page
Airline Maintenance Lodge 702 v. *Loudermilk*, 444 F.2d 719 (5th Cir. 1971)	17
Farowitz v. *Associated Musicians of Greater New York, Local 802*, 330 F.2d 999 (2d Cir. 1964)	12, 16
Giordani v. *Upholsterers International Union*, 403 F.2d 85 (2d Cir. 1968)	12, 16
Hall v. *Cole*, 412 U.S. 1 (1973)	15
Kuebler v. *Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359 (6th Cir. 1973)	12, 16
Linn v. *United Plant Guard Workers*, 383 U.S. 53 (1966)	15
Navarro v. *Gannon*, 385 F.2d 512 (2d Cir. 1967)	16
N.L.R.B. v. *Local 294, International Brotherhood of Teamsters*, 470 F.2d 57 (2d Cir. 1972)	16
Salzhandler v. *Caputo*, 316 F.2d 445 (2d Cir. 1963)	12, 16
Sawyers v. *Grand Lodge, International Ass'n of Machinists*, 279 F. Supp. 747 (E.D. Mo. 1967)	17
Schonfeld v. *Penza*, 477 F.2d 899 (2d Cir. 1973)	16
Semancik v. *United Mine Workers of America District #5*, 466 F.2d 144 (3d Cir. 1972)	12, 17

Statutes:

Labor-Management Reporting and Disclosure Act of 1959:	
Section 3(i), 29 U.S.C. § 402(i) (1970)	8, 11
Section 101(a)(2), 29 U.S.C. § 411(a)(2) (1970)	*passim*
Section 101(a)(5), 29 U.S.C. § 411(a)(5) (1970)	8, 12, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1739

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC.,
Petitioner,

v.

NATIONAL EDUCATION ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals, not yet officially reported, appears in the Petition for Certiorari at App. 8 and is unofficially reported at 92 L.R.R.M. 2576. The findings of fact and conclusions of law of the United States District Court for the Southern District of Florida are reported at 407 F. Supp. 739, 92 L.R.R.M. 2517, and appear in the petition at App. 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Respondent believes that the petition properly presents only the following question:

> (1) Whether respondent, a nationwide teachers' organization, violated Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA"), 29 U.S.C. § 411(a)(2), by adopting and enforcing a rule that prohibited affiliated local organizations from entering into mergers requiring affiliation with the AFL-CIO.

The case below did present, in addition, the following questions, neither of which was reached by the courts below, but which respondent specifies here in order to preserve its rights with respect to additional arguments that support the judgment below:

> (2) Whether local affiliates of a labor organization, in addition to individual members of such an organization, are protected by Section 101(a)(2) of the LMRDA; and
>
> (3) Whether the LMRDA is applicable to a public-sector labor organization with only a *de minimis* number of private-sector members.

STATUTORY PROVISIONS INVOLVED

The statutory provision principally involved in this case is Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 522, 29 U.S.C. § 411(a)(2) (1970), which reads as follows:

> "*Freedom of Speech and Assembly.*—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Other provisions, peripherally involved in the case, appear in the Appendix to the petition (Pet. App. at 9-11).

STATEMENT OF THE CASE

A. Introduction

The proceedings below arose out of a counterclaim brought by petitioner Dade County Classroom Teachers' Association, Inc. ("DCCTA"), in the United States District Court for the Southern District of Florida, Miami Division, seeking to enjoin respondent National Education Association ("NEA") from any attempt to disaffiliate petitioner for violation of a written NEA rule—New Business Item 52—and seeking damages resulting from any disaffiliation proceedings.[1] The issues raised by the counterclaim were tried to District Judge James Lawrence King on June 7, 1974. The Court entered findings of fact and conclusions of law, deciding in favor of respondent NEA, on June 27, 1974. Pet. App. at 1. Final order issued on September 30, 1974, providing that

---

[1] Respondent had brought a breach of contract action against petitioner in the District Court in January 1974. That action was settled and is no longer at issue.

petitioner "take nothing" as to the counterclaim and that the counterclaim "be dismissed on the merits." Pet. App. at 6. Following petitioner's appeal to the United States Court of Appeals for the Fifth Circuit, on the issues presented in the petition, the Court of Appeals, after briefs and oral argument, announced on March 3, 1976, that the judgment was affirmed "on the basis of the opinion of the District Court." Pet. App. at 8.

The essential facts of the case are found in the findings of fact of the District Court (Pet. App. at 1). These facts and certain additional uncontested facts are presented briefly below, together with certain critical facts about the course of proceedings before the District Court and a summary of some of the evidence upon which the District Court findings were based.

B. Statement of Facts

Respondent NEA is a nationwide private organization of teachers and other presons who are involved in education activities and, in particular, in organizing teachers into effective bargaining units. As of April 1974, the NEA had over 1.4 million members; all but 5153 of these members were employed in the public sector. Findings of Fact ¶¶ 1 & 2, Pet. App. at 1-2. In addition to members, NEA has as affiliates state and local education associations. NEA Ex. 3, ¶ 4, CAJA 255.[2]

At the 1972 meeting of the NEA Representative Assembly, composed of some 8000 delegates from state and local affiliates, the Assembly adopted New Business Item 20, a formal and binding announcement of policy, which prohibited NEA and its affiliates from thereafter entering into mergers which would require affiliation with the AFL-CIO. However, NEA affiliates which had already

[2] Citations of the form "CAJA ——" are to the Joint Appendix filed in the Court of Appeals.

entered into such a merger were exempt from the prohibition.[3] Findings of Fact ¶ 3, Pet. App. at 2.

The question of local affiliation with the AFL-CIO was raised again at the meeting of the Representative Assembly in the summer of 1973, and was the subject of considerable debate. The delegates, by a nearly two to one margin, rejected a proposal which would have given local NEA affiliates the option to enter into mergers requiring affiliation with the AFL-CIO. Instead, New Business Item 52 was adopted. This resolution, which superseded New Business Item 20, provided:

> "The NEA and its affiliates will not enter into a merger requiring affiliation with the AFL-CIO, or any other labor organization."

Findings of Fact ¶ 4, Pet. App. at 2; Pretrial Stipulation ¶ 5(d), CAJA 108-09.

The District Court found that the passage of both New Business Item 20 and New Business Item 52 reflected a concern that the merged NEA affiliates were paying money into the AFL-CIO which, in turn, was used to compete against non-merged NEA affiliates. There was a similar concern that the merged NEA affiliates were indirectly supporting the AFL-CIO's efforts to secure legislation that the NEA opposed. Findings of Fact ¶ 5, Pet. App. at 2-3.

Even after the passage of New Business Item 52, a number of NEA local affiliates throughout the country continued to discuss the possibility of merger with local AFL-CIO affiliates. There was underway within NEA a considerable movement to seek repeal of Item 52 at the

[3] One state affiliate (New York) and several local affiliates (New Orleans, Los Angeles, and Flint and Gibralter, Michigan) had previously merged with their American Federation of Teachers counterparts and accordingly had been required to affiliate with the AFL-CIO. NEA Ex. 3, ¶ 6, CAJA 255.

1974 meeting of the Representative Assembly. Findings of Fact ¶ 6, Pet. App. at 3.

Petitioner DCCTA was at this time a local affiliate of the NEA. Its executive director, Mr. Pat L. Tornillo, had attended the 1973 Representative Assembly meeting and was one of the leading advocates of the local option proposal. Findings of Fact ¶ 7, Pet. App. at 3.

On December 10, 1973, the members of petitioner DCCTA voted to accept a merger agreement with the Dade County Federation of Teachers ("DFT"), a local affiliate of the AFL-CIO. The agreement provided for dissolution of the DCCTA and the DFT, and the establishment of an organization to be known as the United Teachers of Dade ("UTD"). The merger agreement also provided that the UTD "shall be a per capita paying local affiliate of the * * * County, State and National AFL-CIO." After the DFT accepted the merger agreement, the membership of both organizations approved a constitution for UTD providing that the new merged organization shall be affiliated with the Florida AFL-CIO and the Dade County Federation of Labor, AFL-CIO. Findings of Fact ¶ 8, Pet. App. at 3-4.

The merger agreement also provided that during the interim period of December 15, 1973, to August 31, 1974, "membership in the UTD shall consist of the combined membership of [DCCTA] and DFT." NEA Ex. 8, Merger Agreement, Art. II(A), CAJA 276. It provided in addition that during the interim period "[DCCTA] and DFT agree to recruit new members only as members of the UTD." *Id.*, Art. I(J), CAJA 276.[4]

In January 1974, the NEA instituted proceedings against petitioner DCCTA to determine whether the local

[4] The statement in the argument section of the petition that disaffiliation proceedings occurred "prior to the merger" (Pet. at 12) is not reflected in the District Court's findings of fact and is contrary to the above-cited evidence at trial.

had violated New Business Item 52. After full hearing on the matter, the NEA Executive Committee, on April 22, 1974, decided that the DCCTA "has entered into a merger requiring affiliation with the AFL-CIO," that this action was "willful," and that the DCCTA's "continued affiliation would be prejudicial to the best interests of the NEA." Petitioner DCCTA's affiliation was terminated. Findings of Fact ¶ 9, Pet. App. at 4; NEA Ex. 13, CAJA 331.

C. The Narrowing of Issues Before Trial

Following petitioner's disaffiliation, the instant case went to trial on June 7, 1974, on petitioner's previously filed counterclaim.[5] That counterclaim had alleged that New Business Item 52 and the NEA disciplinary procedures violated certain of petitioner's rights under the United States Constitution, under the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA"), 29 U.S.C. § 401 *et seq.* (1970), and under its affiliation agreement. See Pet. at 4-6. By the date of trial, however, most of the issues raised in the counterclaim had been dropped. By stipulation, the parties had stated that only two issues of fact remained for litigation at trial:

> "(a) Whether [petitioner DCCTA] is a member of the NEA within the protection of 29 U.S.C. § 411(a)(2).
>
> "(b) Whether Item 52 is a reasonable rule within the meaning of proviso to 29 U.S.C. § 411(a)(2)." Supplemental Pretrial Stipulation ¶ 3, CAJA 123.

In addition, it had been stipulated that the only issues of law remaining for determination by the court were the following:

[5] Petitioner had sought to enjoin the holding of the NEA disciplinary hearing, scheduled for March 18, 1974, but the District Court denied petitioner's motion for preliminary injunction after hearing on March 14-15, 1974.

"Whether NEA is a 'labor organization' within the meaning of 29 U.S.C. § 402(i) so as to establish jurisdiction of this cause under 29 U.S.C. § 412. If so:

"(a) Whether [DCCTA] possesses any rights under 29 U.S.C. § 411 (a) (2); and

"(b) Whether the disaffiliation of [DCCTA] by the NEA for violation of New Business Item 52 constitutes a violation of rights which [DCCTA] may possess under 29 U.S.C. § 411 (a) (2)." Supplemental Pretrial Stipulation ¶ 3, CAJA 123.

These stipulations make it clear that petitioner's counterclaim was not tried below on any issue relating to the requirement that petitioner receive from NEA a "full and fair hearing" under Section 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5). It was not tried, in particular, on any issue relating to the impartiality of the NEA Executive Committee.[6] Furthermore, it was not tried on the allegations made or suggested in petitioner's counterclaim (Pet. at 4-6) that the NEA Executive Committee was *motivated* in its disaffiliation decision by a desire to punish petitioner or retaliate against petitioner for the expression of any views by petitioner or by its officers or members. No such factual issue was presented to the trial judge for determination. NEA had

[6] The previous pretrial stipulation had expressly reserved such an issue in the following words:

"Whether the Executive Committee of the NEA had prejudged the facts alleged in the charge against [petitioner DCCTA] or failed to impartially weigh the evidence received at the hearing on March 18, 1974 so as to deny [DCCTA] a 'full and fair hearing' in violation of 29 U.S.C. § 411(a)(5)." Pretrial Stipulation ¶ 9(c)(2), CAJA 112.

The deletion of this issue from the statement of issues in the later pretrial stipulation can only be read as abandonment of this contention.

continually denied any impermissible motivation; its position was that petitioner had been disaffiliated only for violating an important NEA rule, Item 52. NEA would have been prepared to litigate the factual issue of impermissible motivation at trial on the merits and did not go forward on the issue because of the supplemental pretrial stipulation. The absence of any finding of fact on impermissible motivation confirms that no such issue remains in this case.

D. The Reasonableness of the NEA Rule

After trial on the merits, the trial judge found, as a matter of fact, that New Business Item 52 "is a reasonable rule relating to the responsibility of every member to the organization as an institution." Findings of Fact ¶ 10, Pet. App. at 4. This conclusion was amply supported by the extensive testimony of the two principal witnesses at the trial: Mr. Robert H. Chanin, Deputy Executive Secretary and General Counsel of NEA, and Mr. Pat L. Tornillo, Executive Secretary of petitioner DCCTA.

Mr. Chanin, for the NEA, testified at length about the background of the adoption of New Business Items 20 and 52. In brief, merger with the NEA's nationwide rival, the American Federation of Teachers ("AFT") had long been under active consideration. One state (New York) and several local affiliates had merged with their AFT counterparts, thereby affiliating themselves with the AFL-CIO. However, the overwhelming majority of NEA members did not want to become affiliated with the AFL-CIO, as all AFT mergers required. Mr. Chanin stated that NEA had concluded that such a merger with the AFT, or continued local mergers requiring affiliation with the AFL-CIO, would result in loss of over 500,000 NEA members and the creation of a rival organization. CAJA 358-61, 363-64. In short, Mr. Chanin's testimony

showed that merger with the AFT, with its requirement of AFL-CIO affiliation,—whether nationwide or by individual affiliates—was an extremely sensitive organizational issue, one that threatened the ongoing growth of NEA and raised the possibility of the breakaway of a substantial number of NEA members and affiliates.

This testimony of Mr. Chanin for the NEA was essentially uncontradicted. Mr. Tornillo's testimony for petitioner at trial showed that petitioner's disagreement with Item 52 was on its merits as an organizational rule. For petitioner, the possibility of jurisdictional battle with a local AFT affiliate was highly undesirable. He testified:

> "[W]e were resolved that we were not going to make the mistake that had been made in so many other cities in this country, in other communities and engage in internecine warfare in terms of spending vast sums of money, of dues monies of members to —in a jurisdictional battle as to who was going to represent teachers." CAJA 46.

The solution, according to Mr. Tornillo, was merger and "labor peace."

In short, the testimony showed that petitioner thought its interests would be best served by merger with its AFT counterpart and affiliation with the AFL-CIO, while NEA thought its interests would be best served by a rule against such mergers by local affiliates. It showed, in sum, reasonable differences of opinion over issues basic to teacher organizing and basic to each organization's perception of its own best interests. NEA resolved this difference of opinion in a democratic fashion when its Representative Assembly adopted Item 52. It should finally be noted that NEA introduced uncontradicted expert testimony that bans against dual affiliation had long been common in the American labor movement. CAJA 392-93, 439-40, 445.

It was against the background of all this testimony that the District Court found, both as a matter of fact and as a matter of law, that Item 52 was a "reasonable rule relating to the responsibility of every member to the organization as an institution." These findings placed Item 52 within the proviso to Section 101(a)(2) of the LMRDA, and the District Court accordingly held that that provision had not been violated by the NEA's adoption and enforement of Item 52. Pet. App. at 4.

E. The Remaining Proceedings Below

The District Court did not hold that the NEA was a "labor organization" within the meaning of Section 3(i) of the LMRDA, 29 U.S.C. § 402(i), and thereby subject to the provisions of Section 101(a)(2). Nor did it hold that petitioner DCCTA was a "member" of NEA within the meaning of Section 101(a)(2) or otherwise entitled to the protections of Section 101(a)(2).[7] NEA had consistently urged the District Court that it need not rule on either of these questions if it found Item 52 to be a reasonable rule within the Section 101(a)(2) proviso.[8] NEA argued that the LMRDA did not apply to it and that Section 101(a)(2) did not protect local affiliates only as *alternative* arguments in support of dismissing petitioner's counterclaim. In light of the District Court's ruling on the reasonableness of Item 52, there was no need for it to address these additional questions.

The Court of Appeals for the Fifth Circuit affirmed *per curiam* on the basis of the opinion of the District Court. Pet. App. at 8.

---

[7] Uncontradicted evidence showed that only "individuals" qualify for "membership" in NEA, and that the "affiliate" relationship is entirely distinct. CAJA 296-317; 342-43. At the time of hearing below, only about 113 of the roughly 9000 members of petitioner DCCTA were also members of NEA, CAJA 108, and petitioner did not purport to sue on their behalf.

[8] See NEA Post-Trial Brief Relating to Counterclaim No. 2 (June 19, 1974), at 7, 35, 41; Record on Appeal at 244, 272, 278.

ARGUMENT

1. **Petitioner's first two questions are inappropriate grounds for a writ of certiorari.** Petitioner's first two questions—whether a public sector labor organization with a *de minimis* number of private employees is covered by the LMRDA and whether a local union may invoke the protections of Section 101(a)(2) of the LMRDA—were not decided against petitioner in either of the two courts below. Both courts were satisfied that Section 101(a)(2) of the LMRDA, even assuming its applicability, did not prohibit NEA's disaffiliation action against petitioner. NEA consistently argued that if the courts below were thus satisfied, there was no need to resolve the other two questions of statutory construction. Accordingly, it would be inappropriate for this Court to grant a writ of certiorari to consider either of the first two questions presented by petitioner.

2. **Petitioner is attempting to present a freedom of speech question that was neither litigated nor ruled upon below.** Petitioner's third question asks, in part, whether petitioner's disaffiliation was appropriate under Sections 101(a)(2) and (a)(5) of the LMRDA, 29 U.S.C. §§ 411(a)(2) and (a)(5), when that disaffiliation was *"for speaking out* to urge others to engage in merger for the sake of labor peace in the public schools." Pet. at 3 (emphasis added). The case below was not one—like five of the cases petitioner cites[9]—in which the union overtly disciplined a member or officer for speaking out against union policies. The stated reason for NEA's disaffiliation

[9] *Salzhandler* v. *Caputo*, 316 F.2d 445 (2d Cir. 1963); *Giordani* v. *Upholsterers International Union*, 403 F.2d 85 (2d Cir. 1968); *Farowitz* v. *Associated Musicians of Greater New York, Local 802*, 330 F.2d 999 (2d Cir. 1964); *Kuebler* v. *Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359 (6th Cir. 1973); *Semancik* v. *United Mine Workers of America District #5*, 466 F.2d 144 (3d Cir. 1972). For the facts of each of these cases, together with the other cases cited by petitioner, see note 11, *infra*.

of petitioner was willful violation of the NEA's rule against the act of entering into a merger requiring affiliation with the AFL-CIO. Petitioner attempts to suggest, however, that the case is one in which the "real motivation" for the disaffiliation was reprisal for advocating an unpopular policy. This, in fact, appears to be its principal argument, since six of the eight court of appeals cases in the petition are cited solely for the proposition that such anti-speech motivation taints an otherwise valid disciplining. Pet. at 9-10.

Petitioner's legal principle is sound but inapplicable to this case. The actual motivation for the decision of the NEA Executive Committee to disaffiliate petitioner—and whether, in particular, that actual motivation was reprisal for petitioner's advocating an unpopular policy—would have been a question of fact for the District Judge. NEA was prepared to litigate this issue at the trial below. There was, in its eyes, ample evidence that the actual motivation for the disaffiliation was that reflected in the official NEA decision—that NEA considered the willful violation of its rule against mergers entailing affiliation with the AFL-CIO a serious breach of NEA policy, and one that had to be met with prompt disciplinary action. See CAJA 324-31. This issue, however, was *not* presented to the District Judge. Realizing, we believe, the weakness of its position on this issue of fact, petitioner did not present it. See the Supplemental Pretrial Stipulation, quoted at p. 7 *supra*.

Accordingly, the bulk of the petition concerns a question that was not litigated below and is not appropriately raised in this Court.

3. **Petitioner's "chilling effect" argument has no support in the record or findings below and is without merit.** Petitioner next contends that NEA's disaffiliation of petitioner "*had* a chilling effect and *has* a chilling effect on the free speech and free association rights of

every NEA affiliate in the Country." Pet. at 12 (emphasis in original).[10] No finding of fact was made as to the impact of petitioner's disaffiliation upon other NEA affiliates or upon NEA members. No such factual issue was presented to the District Court, though NEA at no time had conceded any "chilling effect." See Supplemental Pretrial Stipulation, quoted at p. 7 *supra*.

Accordingly, petitioner's "chilling effect" argument must be evaluated in the context of an organization moving in an orderly fashion, through notice and hearing procedures not attacked at trial as unfair or unlawful, to discipline a local affiliate which had willfully broken a rule deemed fundamental to the organization's continued vitality. Petitioner itself, through disaffiliation, lost its voice in internal NEA affairs and lost its right to associate officially with other NEA affiliates. Those other NEA affiliates, at the same time, probably realized that violation of NEA New Business Item 52 on their parts would result in similar disaffiliations, and this realization might have inhibited discussion of mergers that would violate the rule. But such inhibitions on speech and association are necessary effects of any disaffiliation or expulsion. If these effects alone constitute an illegal "chilling effect" on freedoms of speech and association, then no affiliate or member could ever be disaffiliated or expelled, no matter how valid the organizational purpose and no matter how fair the procedures. The Act, as shown by the proviso to Section 101(a)(2) clearly does not contemplate such an absurd result. Nor does any case cited by petitioner suggest such a result.

On analysis, therefore, petitioner's "chilling effect" argument adds nothing to the basic question decided by

[10] Similarly, petitioner states that "[t]he unreasonable severity of the punishment visited upon the local association was sufficient to bring almost all discussion of merger to a standstill within the NEA itself" (Pet. at 14).

the two courts below—whether NEA's prohibition against mergers requiring affiliation with the AFL-CIO was a "reasonable rule" within the proviso to Section 101(a)(2) of the LMRDA. To this issue we now turn.

4. The decision below that NEA was enforcing a reasonable organizational rule within the proviso to Section 101(a)(2) of the LMRDA was correct and presents no substantial question for review. The question properly raised by petitioner is whether the two courts below erred in concluding that NEA New Business Item 52, prohibiting mergers requiring affiliation with the AFL-CIO, was a "reasonable rule" within the meaning of the Section 101(a)(2) proviso. That proviso reads: "[N]othing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution * * *." If Item 52 was such a reasonable rule, then the freedom of speech and association provisions of that section have not been violated.

Respondent submits that a careful reading of the petition turns up no colorable argument that the decision on the applicability of the Section 101(a)(2) proviso by the two courts below was inconsistent with any decision of this Court or with any decision of lower federal courts. Petitioner's own descriptions and excerpts of the cases it cites are sufficient to show that those cases are very different from this one. For convenience, we have set forth in the margin the conduct at issue in each case cited in the petition.[11] Most significantly, not one of

[11] Both Supreme Court cases cited by petitioner are on entirely different issues: *Hall* v. *Cole*, 412 U.S. 1 (1973) (availability of counsel fees in a suit brought to enforce rights under Section 101(a)(2)); *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966) (whether the National Labor Relations Act bars a civil suit for libel under state law, brought by an official of an employer against a union and its officer). As for the lower court cases, they concerned the following factual situations.

[Footnote continued on page 16]

[11] [Continued]

Salzhandler v. *Caputo*, 316 F.2d 445, 446 (2d Cir. 1963): Plaintiff's "unsupported accusations" of larceny by local president held by union trial board to have violated union constitution provisions prohibiting "conduct unbecoming a member," "acts detrimental to * * * interests of the Brotherhood," "libeling, slandering * * * fellow members [or] officers of local unions" and "acts and conduct * * * inconsistent with the duties, obligations and fealty of a member."

Schonfeld v. *Penza*, 477 F.2d 899, 903 (2d Cir. 1973): The complaint alleged that Schonfeld was subject to reprisal for efforts "to advocate and implement changes in union structure and procedures" and that union charges were "pretextual," brought "for the purpose of suppressing opposition and dissent within the union." (The allegations of the complaint were taken to be true for purposes of deciding whether rank and file members could sue to restrain discipline against a union officer.)

N.L.R.B. v. *Local 294, International Brotherhood of Teamsters*, 470 F.2d 57, 60 (2d Cir. 1972): NLRB found that union's reason for disciplining a member (injury to another member without cause and with malice) had been a pretext and the real basis lay in retaliation for the member's filing an unfair labor practice charge against the union and testifying in support of the charge.

Navarro v. *Gannon*, 385 F.2d 512, 515 (2d Cir. 1967): Preliminary injunction granted to prevent the president of the international union from assuming control of a meeting of the local union, from interfering with the right of local members to express views at the meeting, and from interfering with the right to have local officials preside over the meeting.

Giordani v. *Upholsterers International Union*, 403 F.2d 85, 86-87 (2d Cir. 1968): Plaintiff's charge that international union had misappropriated funds was held by union hearing officer to have violated union general law prohibiting the making of "incorrect, false, malicious, or slanderous statements, reports and accusations" concerning the international union or members thereof.

Farowitz v. *Associated Musicians of Greater New York, Local 802*, 330 F.2d 999, 1001 (2d Cir. 1964): Plaintiff's issuing leaflet urging members not to pay dues held by union executive board to have violated union rules.

Kuebler v. *Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359, 361 (6th Cir. 1973): Plaintiff attended unofficial meeting with other union members while strike was in progress and discussed progress in negotiation of a strike settlement; found by union trial board to have attended "a meeting

those cases concerns a rule prohibiting affiliates from merging with affiliates of a rival organization. Not one of those cases even concerns the analogous case of a rule prohibiting members from joining a rival organization.[12] Petitioner's absence of relevant authority, even if not convincing evidence that the decision below was correct, at least demonstrates that the issue is not one upon which lower courts are split.

Petitioner has not attempted to show that the decision below was in error as a matter of statutory construction. In fact, respondent's brief in the Court of Appeals contained extensive citations to the legislative history of Title I of the LMRDA, in support of its argument that Section 101(a)(2) was never thought to have the purpose of prohibiting reasonable union rules against mergers with outside organizations or, indeed, any "associ-

which was held for the purpose of undermining the Union Negotiating Committee," fined and suspended.

Semancik v. *United Mine Workers of America District #5*, 466 F.2d 144, 147-50 (3d Cir. 1972): Two plaintiffs circulated an affidavit during heated election contest charging father of district president with having been a leader of group of strikebreakers at one time; union executive board held hearing on charge that plaintiffs had thereby violated section of union constitution prohibiting "dishonest or questionable practices to secure the election or defeat of any candidate" for union office; five other plaintiffs were also charged with violating that section during the election contest; district court permanently enjoined prosecutions for violation of Section 101(a)(5) full and fair hearing requirement (on grounds, *inter alia*, of bias and vagueness).

[12] Lower courts have been generally favorable to attempts by unions to limit or inhibit "dual unionism" (individual members belonging to rival unions). One court of appeals has indicated that expulsion, as opposed to fining, is an appropriate sanction for a member who becomes an officer of a rival union. *Airline Maintenance Lodge 702* v. *Loudermilk*, 444 F.2d 719 (5th Cir. 1971). Another court has gone so far as to hold that "the *advocation* of dual unionism is not protected either under Title I, LMRDA [which includes Section 101(a)(2)], or Section 7, NLRA." *Sawyers* v. *Grand Lodge, International Ass'n of Machinists*, 279 F. Supp. 747, 756 (E.D. Mo. 1967) (emphasis added).

ation" outside of the union. Section 101(a)(2) itself speaks in terms of "the right to meet and assemble freely *with other members.*" Petitioner has not offered to demonstrate that these words were intended to protect mergers with outside organizations.

Finally, petitioner has not attempted to argue why the evidence respondent presented below in support of the reasonableness of NEA New Business Item 52 was legally irrelevant or insufficient.

In sum, petitioner lost after full hearing before the trial court. It presented all the issues in its petition to the Court of Appeals, and that court affirmed on the basis of the opinion below. In this Court, petitioner has not made any colorable showing that the decision was incorrect or inconsistent with the decisions of other courts. What it has done is attempt to improve its posture by arguing matters of fact that were never presented to the District Court for decision, in a belated effort to fit its case under well-established law, however irrelevant.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

STEPHEN J. POLLAK
JOHN TOWNSEND RICH
SHEA & GARDNER
734 Fifteenth St., N.W.
Washington, D.C. 20005

Of Counsel:

SHEA & GARDNER
734 Fifteenth St., N.W.
Washington, D.C. 20005

RICHARD L. HORN
MILLEDGE, HORN & HERMELEE
2699 South Bayshore Dr.
Miami, Florida 33133
Attorneys for Respondent

June 28, 1976